the earth or permanently fastened to anything attached to the earth.

The most important point arising for determination was whether the English law of fixtures applies in Johore.

I hold that it does apply.

I base this ruling on the grounds on which the judges of the Court of Appeal in the case of *Goh Chong Hin* v. *Consolidated Malay Rubber Estates Ltd.*, (5 F.M.S.L.R. p. 86) decided that the English law of fixtures is applicable in the Federated Malay States.

First, the Legislature of Johore has by necessary implication declared as its policy the adoption of the English law on this point; for section 303 of the Civil Procedure Code in use in Johore introduces the law as to tenant's fixtures, and that is only intelligible and applicable by introduction of the General English law of fixtures of which it forms a part.

Secondly, in the definition of "land" in the Land Enactment, the draftsman used such apt words for the introduction of the English law of fixtures as to make it appear likely that the legislature intended its adoption.

Thirdly, the balance of convenience and reason demand that the Court of Johore should adopt, not a local hybrid system of its own, but the English law of fixtures which prevails in the neighbouring jurisdictions of the Colony and Federated Malay States.

The most important principle of the English law in its bearing on the present proceeding, is that laid down in the case of *Holland* v. *Hodgson*, (7 C.P. 328), "an article which is affixed to the land even slightly is to be considered part of the land, unless the circumstances are such as to show that it was intended all along to continue as to chattel, the onus lying on those who contend that it is a chattel . . . ."

Finally, I rule that it is pertinent, so far as local circumstances permit, to apply English tests and draw English distinctions, as they appear in the decisions of English cases.

Solicitors: *Barrett & Co.; Rodyk & Davidson.*

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STRAITS SETTLEMENTS REPORTS

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REX v. TAN KEE LENG

[A. Cr. J. (Gordon-Smith J.) November 2, 1935]

[Singapore Magistrate's Appeal No. 34 of 1935]

Penal Code, s.409 — Criminal Breach of Trust — Goods on consignment.

The delivery of goods by a merchant to an agent "on consignment" in the absence of express stipulation to the contrary entitles the consignor to demand from the agent the return of the goods at any time or the balance of the goods unsold and to payment at any time for such goods as the agent may have sold. Similarly the agent may return any such goods to the consignor at any time. The agent obtains possession of the goods but neither the property nor the ownership in such goods passes to him and such remains in the consignor. If the agent dishonestly fails to return the goods or to pay for them he may be charged with having committed criminal breach of trust of which offence dishonesty is a necessary ingredient.

MAGISTRATE'S APPEAL.

Tampoe Phillips for the appellant.

Worley (Deputy Public Prosecutor) for the Crown.

The facts and arguments are fully set out in the judgment.

Cur. Adv. Vult.

Gordon-Smith J.: The accused was charged under section 409 of the Penal Code with having committed criminal breach of trust in respect of certain printed piece goods of the value of $1,013.30, with which he, being an agent, had been entrusted.

The offence was alleged to have been committed between the 16th March and the 6th June, 1935.

After a trial which occupied five days, the accused was, on the 14th September, 1935, convicted by the District Judge and sentenced to 22 weeks' rigorous imprisonment.

Against this conviction the accused now appeals on the ground that the conviction was wrong in law and was against the weight of evidence and the probabilities of the case. Details of these allegations are given in the Petition of Appeal and I will deal with them specifically at a later stage of this judgment.

The facts of the case are, briefly, as follows:—

(1) The complainant, Harold Irving Jones, trading as Irving Jones & Co. of 127 Cecil Street, Singapore, and hereinafter referred to as "the complainant," is a general merchant who deals mostly in piece goods by way of wholesale trade and has done business with the accused for about two years and since the accused opened a retail shop at 118 Cross Street, Singapore. On the 16th March last, the accused came to the complainant who had some old out-of-date stock that he wanted to get rid of. He tried to sell it to the accused, without success but after some bargaining the accused agreed to take it "on consignment." The complainant's evidence as to this transaction is as follows: — "this meant that they were given to him on behalf of me to sell at a minimum price fixed by me; they remained my property till he paid for them at the agreed price. He held them in trust for me and on my account. He was allowed to make two cents per yard profit or 10% on agreed price. In this case I fixed the price low at 20 cents per yard and stipulated that they should be sold for cash."

Subsequently the goods, which amounted to 5,066½ yards, were delivered to the accused together with two invoices on which the accused put his chop mark as an acknowledgment and which were returned to the complainant. The complainant states that he gave these invoices personally and got them personally. They were specifically marked with the words "on consignment", to shew the nature of the transaction and to distinguish it from other business transactions which had passed between the complainant and accused.

(2) To confirm and corroborate the meaning of "on consignment" and as to the nature of the transaction, another merchant, a Mr. Jackson gave evidence as follows:—

"I have often given goods on consignment. This term means goods put out on trust for sale or return. Consignor can at any time demand goods or their money equivalent.

That is a general arrangement recognised by the Chamber of Commerce and I should call it world wide interpretation of 'on consignment.' Consignee is responsible to consignor."

In cross-examination he added that the consignee is a trustee for the consignor.

(3) The accused's own evidence in this respect is as follows:—

"He again offered to sell to me @ 18 cts. but I refused whereon he said he would give them to me on consignment @ 20 cents per yard. By 'on consignment' he explained to me that I could sell for him for cash or credit and pay him when I collected. Balance unsold was not mentioned and no time limit was fixed. He simply asked me to sell the lot. He showed me one roll only. This was on 16/3/35."

[52] [52] It will be seen that there is a conflict of evidence between that of complainant and accused as to whether the latter could sell for cash only or on credit.

(4) The complainant and accused were apparently meeting fairly often in the course of business and in the weeks previous to the 5th June, the accused told the complainant that he had sold some of the goods and it was agreed that he should pay in on the 5th June.

On either the 1st or 2nd June the accused gave the complainant a cheque for $568.16 in respect of other business transactions on which the accused owed the complainant over $2,000. This cheque was paid in by the complainant to his bank but it was dishonoured and returned by the bank noted R/D on the 5th June. On the same day the complainant took it to the accused who promised to pay money into the bank to meet it. It has not been suggested that this cheque was in payment of any amounts due under the transaction "on consignment" and in fact the accused himself referred to the particular bills to which it related.

(6) The accused not having paid in anything to the complainant in accordance with his promise, the complainant saw him about it on the afternoon of the 5th June when the accused said that he would come to the complainant's office that evening and pay. At this interview which took place at the accused's place of business, everything appeared to the complainant to be normal, the shop well stocked and the complainant saw 20 or more rolls of his "on consignment" goods in the shop. Again the accused failed to keep his promise on the appointment, and consequently the complainant went round to see him the next morning. He found the shop closed but when he gained entry he found the inside in chaos, empty boxes scattered around, only a few remnants of the stock left, all his rolls that he had seen the previous day gone, except one, and generally the shop presenting an appearance of a hurried departure. It is not specifically stated by the complainant in his evidence but it is to be inferred that he found no responsible person on the premises at the time of his visit nor could he see the accused's books there.

(7) The complainant's suspicions being aroused by these events which convinced him, so he says, that the accused's intentions were dishonest, he laid information immediately with the Police, with the result that a warrant of arrest was issued the same day.

This warrant was not executed until over six weeks later, namely, on the 25th July, the accused being arrested at his father-in-law's house.

It can only be inferred that during this interval of six weeks the accused was in hiding, or otherwise keeping out of the way of arrest as either on the 7th or 8th June he approached a business friend with the request to approach his creditors on his behalf with a view to a composition. Although not very material to the issue in this case, it was proved that this business friend with the assistance of a guarantor (the accused's father-in-law) approached the accused's creditors and they were prepared to accept a guaranteed composition of 25% on the debts owed to them by the accused. The complainant was also approached and was prepared to accept this composition in respect of his other business transactions with the accused but not in respect of the goods delivered in the "on consignment" transaction and returned a promissory note that was proffered.

The above are the proved facts in the case and are practically undisputed.

In giving his reasons for judgment, the learned District Judge found, *inter alia*:

(a) That the term "on consignment" is a commercial and not a legal term to be interpreted by merchants and he accepted the evidence of the complainant and Jackson that the former was entitled to return of the goods or to repayment for them at any time.

(b) That the accused had not returned the goods nor had he paid for them.

(c) That he did not believe the accused's account of complainant's dealings with the dishonoured cheque.

(d) That the accused left Singapore under suspicious circumstances, without warning, that his whereabouts could not be ascertained and that most of his stock vanished at the same time.

(e) That the accused's failure to return or pay for the goods was dishonest.

(f) That sales alleged by the accused of which he produced books and details on the 27th August (i.e. towards the end of the trial) were not proved.

The grounds of appeal on the points of law are that the District Judge:

[53] (a) Erred in holding that goods "on consignment" without any other express terms in the written contract give the owner the right to demand the return of the goods on their price, at any time. [53]

(b) Failed to appreciate that the words "on consignment" mean "on sale or return."

(c) (i) Failed to note that a consignee of such goods had the right in law to sell or return the goods in a reasonable time.

(ii) Failed to note that if the consignee 'adopted the transaction' the ownership in the goods vested in the consignee and that the liability to pay for them was only a civil liability.

(d) Erred in convicting the accused because having adopted the transaction and the ownership in the goods having passed to the consignee the accused could not be convicted of criminal breach of trust in respect of his own property.

I have had to divide ground (c) into two parts and to paraphrase this and ground (d) in order to make clear the contention put forward.

I will deal with the other grounds of appeal relating to the weight of evidence at a later stage.

Firstly, as to ground (a) of appeal. The contention as applied to the facts of the case, is not very clear but in view of the argument put forward, although not very strenuously, that the terms of a written contract cannot be varied by parol evidence it is necessary to consider briefly this contention. If I understood counsel for the accused correctly, he was attempting to argue that the terms of the contract were contained in Exhibits D and D 1, i.e., the invoices subsequently delivered which were headed "on consignment," and that therefore there was a written contract. This is not so. The contract was a verbal one entered into at the complainant's place of business on the 16th March between the complainant and the accused and on the terms then and there agreed. The delivery of the invoices are only a subsequent incidence of the verbal contract. Even if these invoices could be held to be a written contract it is abundantly clear that parol evidence could be given to explain the documents and the terms of the contract on which it is silent. See section 92 of the Evidence Ordinance Provisos 2 and 5 and numerous cases which I need not cite.

Secondly, as to ground (b). There is nothing in the evidence or in the reasons for judgment to support this allegation, nor has this point been specifically argued. The learned District Judge definitely found that the accused received the goods as agent for the complainant for sale or return. It is true that whereas he found that the complainant was entitled to the return of the goods or to payment at any time, he did not find specifically that the accused was so entitled. There is no evidence whatsoever that the accused ever attempted or expressed any desire to return the goods, nor did he pay for any of them, even including those which he himself sold for cash.

As to ground (c) (i), the answer is found in the preceding paragraph of this judgment.

I propose to deal with grounds (c)(ii) and (d), which I have had to paraphrase to make them intelligible, together as they are inter-related.

The learned District Judge in his reasons for judgment accepted the evidence of the two merchants as to the meaning of "on consignment" and it is only on reference to their respective evidence both in chief, cross-examination and re-examination and re-examination that it can be ascertained. I propose therefore to set out specifically what from an examination of their evidence it does mean in order to avoid possible ambiguity in the future.

It is a mercantile term synonymous with "sale or return," it means that a merchant consigns goods to an agent for sale on his behalf at the prices set out in the consignment note or invoice accompanying the goods and on any other terms that may be specifically incorporated in such document or in any agreement relating to the transaction. The agent obtains possession of the goods but neither the property nor the ownership in such goods passes to him and such remains in the consignor.

It may be that terms are set out in the document by which the goods are consigned relative to remuneration of the agent by way of commission or otherwise or other conditions on which the goods may be sold are set forth. On the other hand such terms or conditions may not be so incorporated in which case parol evidence may be given on any matters relative to the transaction on which the document is silent. Further, it may be that there is no document accompanying the goods, in which case the parties are dependent on parol evidence entirely, as to the arrangement, in the absence of other specific written agreement. The delivery of goods by a merchant to an agent "on consignment" in the absence of express stipulations to the contrary entitles the consignor to demand from the agent the return of the goods at any time or the balance of the goods unsold and to payment at any time for such goods as the agent may have sold for cash. Similarly the agent may return any such goods to the consignor at any time. As Mr. Jackson stated, the agent is a trustee of the goods for the consignor. I agree that to some extent this is correct.

When the agent effects a sale of the goods to a customer the property and ownership in the goods passes to such customer, but not from the agent who although he has acquired possession of the goods has never acquired any property or [54] ownership in the goods and therefore the ownership passes to the customer direct from the consignor. [54]

I do not think that it would be correct to designate or describe a transaction "on consignment" as being a peculiar local custom of trade, but it may be a local term for describing the transaction when goods are consigned "on sale or return."

In the case in point the arrangement was verbal and evidence was given as to the terms of the arrangement and invoices were subsequently sent which incorporated some but not all of the terms of the arrangement. The invoices confirmed specifically the fact that the goods were sent "on consignment" and set out the minimum prices at which the goods could be sold. It was a term of the arrangement that the goods should be sold for cash only because of the low minimum prices which had been fixed. The accused disregarded this condition and sold some of the goods on credit but whatever his civil liability may be for breach of this condition, he did ont thereby commit criminal breach of trust. Nor is he so charged on that account.

The essential point in this case is that ownership of property in the goods did not at any time pass to the accused and that by effecting any sale he did not thereby "adopt the transaction" so as to enable such property or ownership to pass to him.

Many cases were quoted to me.

Kirkham v. *Attenborough,* [1897] 1 Q.B. p. 201; *Folkes* v. *King,* [1923] 1 K.B. p. 282; *London Jewellers* v. *Attenborough,* [1934] 2 K.B. p. 206.

Kempler v. *Bravingtons Ltd.,* 135 L.T.R. p. 680 and others, many of which, although extremely interesting have very little application (if any) to this case. They were all civil cases arising on the point as to whether the ownership or property in the goods had passed as a result of the wrongful and sometimes criminal act of the agent in obtaining possession of goods and passing on that possession to third parties. They are decisions on the particular facts in each case, as to who, of innocent parties must bear a loss, owing to the distinction in English law between larcency, larcency by a trick, false pretences and other forms of frauds. In these cases sections 18 and 25 of the Sale of Goods Act, 1895, and section 2 of the Factors Act also come into the question and the whole question of the ownership of goods where possession has been parted with under such circumstances of fraud has, owing to earlier conflicting opinions, become very involved.

The grounds of appeal therefore contained in these two paragraphs have no application to the facts proved in this case.

The second half of the petition is taken up with setting forth three grounds on which it is alleged that the learned District Judge's judgment was against the weight of evidence. They are, shortly:—

(a) In respect of the matter contained in paragraph 3(f) of this judgment, i.e. that certain sales by the accused, of which he gave evidence in detail and produced certain book

towards the end of the trial, were held by the District Judge not to have been proved. I fail to see that this is relevant to the charge, except to put the accused in a worse position. The more cash sales that were proved to have been effected by him, only made his position worse.

Also it is neither for the Court nor for the prosecution to intimate to the defence what witnesses or what evidence should be called for the defence.

(b) That the complainant had at no time asked the accused for his account books or that he wanted particulars of sales. The learned District Judge does not mention this point in his reasons for judgment. Neither does it appear in the evidence given. What does appear is that the accused definitely failed to keep promises made to the complainant to pay him amounts received in respect of the sales effected and then, when matters appear to be coming to a head, closes down his shop, disposes suddenly and secretively of practically his whole stock and disappears.

(c) I fail to understand this last ground as a reason for saying that the judgment was against the weight of evidence. It refers to the evidence given as to a proposed composition amongst the accused's creditors which, incidentally, was started after the warrant of arrest had been issued and whether the complainant knew or thought he had only a civil remedy against the accused is beside the point. The fact that he laid a criminal complaint immediately after accused's disappearance, hardly supports this suggestion.

What I have been concerned about more than anything else in this case is as to whether there is any possible ground for saying that the learned District Judge erred in drawing the inferences he undoubtedly did from the proved facts that the accused's failure to return the goods or pay for them was dishonest. Dishonesty is a necessary ingredient of the offences charged without proof of which a conviction cannot be obtained.

Having regard to the accused's conduct on the 5th June and subsequent days, namely the interview with the complainant as to the [55] dishonoured [55] cheque, the promise to pay for the "on consignment" goods that evening, his failure to keep either the appointment or his promise, the closing of the shop and surreptitious disposal somehow of the stock during the night and the subsequent flight and disappearance of the accused for several weeks during which time he contrived to for his creditors to be approached with a view to a composition being accepted, these are, in my opinion, ample grounds on which the learned District Judge might properly come to the conclusion he did, and convict the accused.

Neither in law, nor on the facts have any sufficient reasons been shewn for reversing his decision and quashing the conviction.

The appeal is therefore dismissed.

Appeal dismissed.

Solicitor: *E. M. Tampoe-Phillips.*

LIM YEW HOCK v. THE MUNICIPAL COMMISSIONERS OF THE TOWN AND FORT OF MALACCA

[O.C.J. (Burton Ag. C.J.) November 4, 1935]

[Malacca Suit No. 51 of 1935]

Ordinance No. 132 (Public Authorities Protection), s.2(1) —Action for mandamus.

An action for a *mandamus* (as distinguished from the prerogative writ of *mandamus*) comes within the word "action" in section 2(1) of Ordinance No. 132 and is subject to the restrictions imposed in respect of such actions by that Ordinance.

Semble, applications for the prerogative writs and actions founded in contract are not "actions, prosecutions or proceedings" within the language of section 2(1) of Ordinance No. 132 (Public Authorities Protection) and are excluded from the scope of that Ordinance.

TRIAL OF ACTION.

O'Connor for the defendants.

John Laycock for the plaintiff.

In this case the plaintiff brought an action against the Municipal Commissioners of the Town and Fort of Malacca for a *mandamus*. His claim in the statement of claim included claims for: (1) a declaration that a certain Municipal Building By-Law was unreasonable and *ultra vires* and void; (2) a *mandamus* ordering the defendants to consider and properly exercise their discretion on the question of the issue or non-issue to the plaintiff of a licence to manufacture and treat rubber at his factory. The defendants pleaded a defence on the merits and they also pleaded that the action was barred by Ordinance No. 132 (Public Authorities Protection) as no notice had been given in accordance with section 2(2)(a) of that Ordinance and also because the plaintiff had not pleaded that defendants had acted maliciously and without reasonable or probable cause. Thereupon the Court directed that the action should be transferred to Singapore for argument on the questions of law raised in connection with the Public Authorities Protection Ordinance. This preliminary point came on for hearing in Singapore on the 25th October, 1935 and the 28th October, 1935.

The suit is barred by Ordinance No. 132 (Public Authorities Protection). Sub-section (2)(a) and (b) and (3) of section 2 have not been complied with.

This is an "action" between a plaintiff and defendant comenced by writ of summons. It is commenced against a "person." The defendants are a "Public Authority." It is in respect of an act done in intended execution of a public duty or a neglect or default in the execution of a public duty and it falls within section 2(1) of Ordinance No. 132. The Public Authorities Protection Ordinance almost certainly does not apply to the prerogative writ of *mandamus*. [*Halsbury,* 2nd ed. vol. 9 p. 784 para. 1327 and note (e) p. 778 para. 1315 and note (g)].

In England the cases in deciding that the Public Authorities Protection does not apply to the prerogative writ are that such an application is not an "action,